BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT WITT	)	
Claimant	)	
	)	
VS.	)	
	)	
HABITAT RESTORE	)	
Respondent	)	Docket No. 1,031,301
	)	
AND	)	
	)	
FEDERAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the November 8, 2006 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The claimant had thrown his hard hat in anger while at the job site. The headband had come off and fallen into the basement of the home where claimant was working. When claimant went down into the basement to retrieve the headband he fell and injured his hand. It was disputed whether claimant had clocked out for the day when the accident occurred.

The Administrative Law Judge (ALJ) found the claimant's accidental injury arose out of and in the course of employment with the respondent. The ALJ concluded it was immaterial whether claimant had clocked out or not as he was on the premises and the accident arose in the course of employment. The ALJ further determined the accident was sufficiently related to the work that it arose out of the employment.

The respondent requests review of whether the claimant's current need for medical treatment arose out of and in the course of employment with the respondent. Respondent denied the claim was compensable because the claimant had already clocked out of work. Respondent argued that claimant's activities in retrieving the headband while on the premises were of a personal nature or personal errand and, therefore, the premises exception to the "going and coming" rule would not apply.

Claimant argues the ALJ's Order should be affirmed. Claimant argues that the "going and coming" rule is applicable and because the injury occurred on the premises it is compensable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Mr. Witt was employed as a de-construction crew member for respondent. His job was to de-construct houses by taking them apart piece-by-piece from the roof to the foundation. It was undisputed that on September 19, 2006, claimant got into an argument with a co-worker and threw his hard hat across the work site. The head band came off the hard hat and fell into the exposed basement. As claimant went down into the basement to retrieve the headband he fell and injured his hand.

It was disputed whether claimant was still working when the accident occurred. Claimant testified that at the conclusion of the workday the employees would then pick up their tools. As he was picking up tools claimant got into the argument with his co-worker because he felt the co-worker was not doing his share of the work. Claimant threw his hard hat in anger and he then went down the stairs to the basement and fell. Claimant testified that he returned back upstairs and did not realize how badly he had injured his hand until he returned to picking up tools. When he tried to pick up a crowbar he dropped it because of the intense pain in his hand.

Carlton Davis testified that he was in charge of the crew claimant worked on. Mr. Davis testified that he completes the time sheets at the end of each work day and has each employee sign it. He further testified that the claimant had already signed his time sheet, the tools had been picked up and locked in the job box and the claimant was walking to his car when claimant stated he needed to go back and get his hard hat. Claimant returned to the basement and when he came back upstairs he was hollering about his hand.

The respondent had established an 8 a.m. to 4:30 p.m. work day. Claimant testified that he had clocked out many times but continued to work in order to finish the job for that day. And the crew leader agreed that there were times when tools would be picked up after the conclusion of the 4:30 workday.

The claimant was taken to KU Medical Center for medical treatment. On September 22, 2006, the claimant had surgery which involved the placement of two pins in his right hand by Dr. Shane Kim. The doctor released the claimant with restrictions to light-duty work on October 26, 2006.

The determination of whether claimant suffered a compensable injury requires an analysis of whether he slipped and fell while in his employer's service or while going to or coming from his employment. The "going and coming" rule contained in K.S.A. 44-508(f) provides in pertinent part:

> The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[1] In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[2]

But K.S.A. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[3] Because claimant was on the premises when the accident occurred he was still in the course of employment.

The ALJ analyzed whether the accident arose out of the employment in the following fashion:

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[1] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[2] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, at 46, 883 P.2d 768 (1994).

[3] Id. at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

> The remaining question is whether the claimant's injury arose out of the employment. One can draw causal connections between the claimant's injury and the work conditions. He threw the hard hat in frustration because of an argument at the jobsite. He had a hard hat to throw because he was employed in this type of occupation. There was an open foundation nearby because he was employed in this type of occupation. The claimant's action in throwing the hat had nothing to do with performing his job. It was a personal, emotional expression, but the workers compensation act is not interpreted so rigidly that a momentary personal action, within reason, suspends the entire notion that the employee is working.[4]

The test for determining whether an injury arose "out of" employment excludes any injury that is not fairly traceable to the employment and not coming from a hazard to which the worker would have been equally exposed apart from the employment.[5] In this case, claimant was provided the hard hat by respondent as a part of his tools. The tools were required to perform his job duties and were not to be left at the job site unless locked in the job box. Mr. Davis agreed that tools would not be left lying out. Consequently, it was necessary for claimant to retrieve his headband just the same as he would pick up other tools at the job site before leaving work for the day. Proceeding down into the basement exposed claimant to an increased risk of injury of the type actually sustained.[6] Accordingly, this Board Member finds the claimant's accident did arise "out of" and "in the course of" his employment with the respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[8]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated November 8, 2006, is affirmed.

IT IS SO ORDERED.

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[4] ALJ Award (Nov. 8, 2006) at 2.

[5] *Newman v. Bennett*, 212 Kan. 562, 567, 512 P.2d 497 (1973).

[6] *Angleton v. Starkan, Inc.*, 250 Kan. 711, Syl. ¶ 7, 828 P.2d 933 (1992).

[7] K.S.A. 44-534a.

[8] K.S.A. 2005 Supp. 44-555c(k).

Dated this 31st day of January, 2007.

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BOARD MEMBER

c: Michael J. Joshi, Attorney for Claimant
Jeff S. Bloskey, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge